

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PHILIN CORPORATION, a)
California corporation,)

Plaintiff,)

v.)

WESTHOOD, INC., an Oregon)
corporation, fka D.S.)
PARKLANE DEVELOPMENT, INC.)

Defendant.)

No. CV-04-1228-HU

FINDINGS & RECOMMENDATION

Helen C. Tompkins
Law Office of Helen Tompkins
111 S.W. Columbia Street, Suite 1000
Portland, Oregon 97201

John S. Stone
John S. Stone, LLC
1500 S.W. First Avenue, Suite 770
Portland, Oregon 97201

John S. Cha
Stone Rosenblatt & Cha
21550 Oxnard Street, Main Plaza, Suite 200
Woodland Hills, California 91367

Attorneys for Plaintiff

/ / /

/ / /

1 - FINDINGS & RECOMMENDATION

1 Joel A. Mullin
Beverly C. Pearman
2 STOEL RIVES LLP
900 S.W. Fifth Avenue, Suite 2600
3 Portland, Oregon 97204

4 Attorneys for Defendant

5 HUBEL, Magistrate Judge:

6 Plaintiff Philin Corporation brings claims against defendant
7 Westhood, Inc., for declaratory relief, breach of contract, breach
8 of fiduciary duty, and demand for corporate records. Westhood
9 moves for sanctions pursuant to Federal Rule of Civil Procedure 37.
10 Westhood initially seeks to dismiss the case. Alternatively,
11 Westhood seeks attorney's fees in connection with a previously-
12 filed motion to compel. I recommend that the motion for sanctions
13 be denied as to the dismissal request, and be granted in part and
14 denied in part as to the fee request.

15 More than two years has passed since the case was filed. The
16 case got off to a slow start first because plaintiff did not serve
17 defendant for almost four months after filing, and next because
18 defendant successfully moved to disqualify plaintiff's original
19 counsel. Following the resolution of that motion in the spring of
20 2005, new counsel for plaintiff appeared and a case schedule was
21 established on May 26, 2005.

22 Although plaintiff prevailed over defendant's objection in
23 obtaining an additional eight months to complete discovery,
24 plaintiff initiated no discovery during that period. In October
25 and November 2005, defendant served a request for production of
26 documents, requests for admissions, and interrogatories on
27 plaintiff. Plaintiff's counsel told defendant's counsel he was
28 going to withdraw from representing plaintiff in this action.

2 - FINDINGS & RECOMMENDATION

1 Plaintiff did respond to the requests for admission and production,
2 but the responses were not complete. Plaintiff never responded to
3 defendant's interrogatories.

4 In January 2006, plaintiff's counsel formally moved to
5 withdraw. The motion was granted and plaintiff was given until
6 March 3, 2006 to obtain new counsel. New counsel filed a notice of
7 appearance on March 2, 2006.

8 Defendant initiated contact with plaintiff's new counsel and
9 reminded plaintiff of the outstanding discovery requests.
10 Plaintiff's counsel represented that plaintiff's principal, Mrs.
11 Kwi-Ok Kim, was in Korea and that information was forthcoming.
12 Plaintiff's counsel told defendant's counsel he expected to hear
13 from Mrs. Kim in mid-April.

14 At the end of March 2006, defendant moved to dismiss for
15 failure to prosecute, or alternatively to compel plaintiff's
16 responses to the outstanding discovery requests. Plaintiff moved
17 to extend discovery and other deadlines. At a hearing on April 14,
18 2006, I expressed concern over plaintiff's lack of diligence in
19 prosecuting this case. Plaintiff's counsel indicated that it had
20 a meeting set for the end of April to meet Mrs. Kim in Los Angeles.
21 I ordered plaintiff to respond to the outstanding discovery no
22 later than May 8, 2006, and set a further hearing on May 17, 2006.

23 At the May 17, 2006 hearing, I denied defendant's motion to
24 dismiss for lack of prosecution and I granted in part and denied in
25 part defendant's alternative motion to compel. Much of the denial
26 of the motion to compel was due to plaintiff's having responded to
27 the outstanding discovery requests by May 8, 2006, as I had
28 ordered.

3 - FINDINGS & RECOMMENDATION

1 I also ordered Mrs. Kim, who had still not returned from Korea
2 despite plaintiff's earlier representation that she was to return
3 to the United States in late April, to bring with her from Korea
4 all of the documents relevant to this litigation, to have them in
5 her counsel's possession by May 26, 2006, and to produce them to
6 defendant by that date, with or without translations. I further
7 ordered her to provide to her counsel a statement of what efforts
8 she had made and continued to make to locate relevant documents, in
9 the United States, Korea, or elsewhere.

10 Defendant filed this motion on June 1, 2006, seeking dismissal
11 of the case because Mrs. Kim returned from Korea without any
12 documents responsive to defendant's outstanding document requests.
13 Defendant argues that dismissal is warranted because Mrs. Kim
14 either intentionally deceived the Court about her activities while
15 in Korea or she violated the Court's order to produce documents by
16 May 26, 2006.

17 I. Dismissal

18 Federal Rule of Civil Procedure 37(b)(2)(C), authorizes the
19 Court to dismiss an action for violation of a discovery order.
20 Defendant relies on this provision to support its argument that
21 Mrs. Kim's failure to produce documents obtained in Korea to
22 defendant by May 26, 2006, justifies dismissal of the action.
23 Alternatively, defendant relies on the Court's inherent authority
24 to argue for dismissal based on Mrs. Kim's alleged deception.

25 I recommend that defendant's request for dismissal be denied.
26 I do not find Mrs. Kim's conduct sufficiently egregious or
27 disingenuous to warrant dismissal. While Mrs. Kim did not return
28 from Korea with documents responsive to defendant's requests,

1 defendant has no concrete facts to contradict her representation
2 that she was searching for relevant documents or that her "team"
3 was searching for relevant documents. That she returned with no
4 documents responsive to defendant's discovery requests does not,
5 without more, prove, to a degree of certainty required for a
6 sanction as drastic as dismissal, that she was never searching for
7 such documents or that she failed to produce them in violation of
8 my previous order.

9 Additionally, as to the 5,700 pages of documents produced to
10 defendant in May 2006, defendant argues that dismissal is warranted
11 because they were belatedly produced and Mrs. Kim's explanation for
12 the timing of the production is implausible. Again, defendant
13 produces no concrete facts in support of its disbelief of Mrs.
14 Kim's recitation of events. However, even if defendant were
15 correct, Mrs. Kim's actions in regard to the documents actually
16 produced do not justify dismissal.

17 II. Fees

18 Rule 37(a)(4) authorizes the Court to award attorney's fees to
19 a party who prevails in a motion to compel. Defendant seeks fees
20 for its March 2006 motion to dismiss and alternative motion to
21 compel. Defendant contends that even though it did not prevail on
22 the motion to dismiss, it is entitled to fees for both the motion
23 to dismiss and the motion to compel because both motions were based
24 on plaintiff's failure to prosecute as evidenced by its failure to
25 respond, or respond adequately, to defendant's discovery requests.

26 Plaintiff contends that defendant is not entitled to fees for
27 the motion because it responded to the requests before the hearing
28 on the motion. Plaintiff also contends that defendant's fee

1 request is unreasonable.

2 I reject plaintiff's argument that defendant is not entitled
3 to fees. Defendant's motion was the catalyst for the production of
4 documents and complete responses to other outstanding discovery
5 requests. The fact that plaintiff provided the bulk of the
6 documents and responses before the hearing is irrelevant to
7 defendant's necessity in filing the motion. See Fed. R. Civ. P.
8 37(a)(4) (mandating, unless the court finds the presence of certain
9 exceptions, an award of reasonable expenses "[i]f the motion is
10 granted or if the disclosure or requested discovery is provided
11 after the motion was filed[.]") (emphasis added).

12 I also reject defendant's position that it is entitled to fees
13 for both motions. Regardless of the shared reasoning, defendant
14 did not prevail on its dismissal request. Fees are appropriately
15 rewarded only for the motion to compel. As detailed below, the
16 number of hours spent on the motion to dismiss, and thus, deducted,
17 is 20.1.

18 A. Reasonable Number of Hours

19 Exhibit 1 to the May 30, 2006 Affidavit of Joel Mullin is a
20 chart of the requested attorney's fees.¹ First, in accordance with
21 my recommended ruling above regarding awarding no fees for time
22 spent on the motion to dismiss, I recommend that the following
23

24 ¹ The chart reflects a request for \$11,232 in fees.
25 Defendant concedes in its reply memorandum that \$270 for time
26 spent by Beverly Pearman on May 12, 2006 in responding to
27 plaintiff's motion to compel, should not be part of the request.
28 Although defendant represents that subtracting the \$270 from the
original \$11,232 request leaves an award of \$11,205, defendant's
computation is erroneous. Subtracting \$270 from \$11,232 leaves
\$10,962.

1 requested time be disallowed: 6.4 hours by Emily Edling on March
2 24, 2006, 3.5 hours by Beverly Pearman on May 10, 2006, 0.5 hours
3 by Joel Mullin on May 11, 2006, 4.9 hours by Pearman on May 11,
4 2006², 4.0 hours by Mullin on May 12, 2006³, and 0.8 hours by
5 Pearman on May 15, 2006⁴.

6 Second, I recommend that the initial conference among three
7 attorneys in commencing preparation for the motion be disallowed.
8 While defense counsel may choose to have multiple attorneys work on
9 a fairly simple and straightforward motion to compel, I conclude
10 that it is unjust to shift that particular expense to plaintiff.
11 Thus, I recommend that the following time be disallowed: 0.3 hours
12 by Mullin, 0.4 hours by Pearman, and 0.3 hours by Edling, all on
13 March 24, 2006.

14 Third, I recommend disallowing the 2 hours claimed by Pearman

15
16 ² This entry by Pearman also suffers from a "block billing"
17 problem which I have previously defined as billing a total number
18 of hours for a day when more than one task, often many tasks,
19 were performed, without specifying what portion of time was spent
20 on each task. Frevach Land Co. v. Multnomah County, No. CV-99-
21 1295-HU, Op. & Ord. at p. 21 (D. Or. Dec. 18, 2001). Moreover,
22 even if I construe the task described as "review plaintiff's
arguments and affidavits" as pertaining to the motion to compel
as opposed to the motion to dismiss, it is the only one of the
four tasks properly compensable here. Her other time is spent on
the motion to dismiss and on a response to plaintiff's motion to
compel.

23 ³ Mullin's entry reads "Revise draft opposition to motion
24 to dismiss." Whether I construe this as revising the reply in
25 support of defendant's motion to dismiss or as revising the
26 opposition to plaintiff's motion to compel, the time should be
disallowed as being spent on the dismissal motion or on
responding to plaintiff's motion.

27 ⁴ This entry also claims unsegregated time for responding
28 to plaintiff's motion to compel, a task not compensable in this
motion.

1 for attending the May 17, 2006 hearing. Sending two attorneys to
2 this hearing is a choice made by defendant and its counsel, but it
3 is unjust to require plaintiff to pay for that choice.

4 Finally, in regard to the remaining entries, I make the
5 following recommendations:

6 (1) March 27, 2006: I recommend awarding Mullin none of the
7 1.0 hour requested because none of the three tasks he spent time on
8 is compensable. As noted above, I recommend awarding no fees for
9 time spent on a motion to dismiss or for conferencing with other
10 defense counsel. I also find no basis for awarding fees for time
11 spent talking to a client in preparation for a motion to compel.

12 (2) March 28, 2006: I recommend awarding Mullin 0.3 hours
13 for time spent on the meet and confer with plaintiff's counsel and
14 0.2 hours for time spent reviewing and revising the motion to
15 compel;

16 (3) March 28, 2006: I recommend awarding Edling 0.5 hours
17 for time spent on the motion to compel. Any additional time is
18 unreasonable;

19 (4) May 4, 2006: I recommend awarding 0.2 hours to Mullin
20 for time spent on an email to plaintiff's counsel;

21 (5) May 9, 2006: I recommend awarding 0.5 hours to Mullin
22 for his additional analysis of plaintiff's filings⁵ and 0.1 hours
23 for time spent on a telephone call from the Court regarding the
24

25 ⁵ It is possible Mullin's reference to plaintiff's
26 "filings" is to plaintiff's motion to compel, filed May 8, 2006,
27 which would not be compensable in this motion, rather than to
28 plaintiff's April 11, 2006 response to defendant's motion to
dismiss and compel. However, plaintiff does not specifically
challenge this entry and I give defendant the benefit of the
doubt.

1 hearing on the motion to compel;

2 (6) May 10, 2006: I recommend disallowing the 0.3 hours
3 requested by Mullin for a telephone call to his client;

4 (7) May 15, 2006: I recommend disallowing the 2.5 hours
5 requested by Mullin. None of the time he spent is reasonably
6 compensable here because it was spent communicating with his
7 client, revising the motion to dismiss, or revising the opposition
8 to plaintiff's motion to compel;

9 (8) May 17, 2006: I recommend allowing 3.0 hours for Mullin
10 to prepare for and attend the May 17, 2006 hearing on the motion to
11 dismiss and compel.

12 In sum, I recommend awarding 0.5 hours to Edling and 4.3 hours
13 to Mullin.

14 B. Reasonable Hourly Rate

15 Defendant requests \$400 per hour for Mullin's time and \$215
16 per hour for Edling's time. Mullin states that he has practiced
17 law for twenty-five years, the past twenty as a member of the
18 Oregon State Bar. May 20, 2006 Mullin Affidavit. He further
19 states that Edling is a first year associate. No other information
20 about the education or experience of these attorneys is provided.
21 The only other relevant information regarding the hourly rate is
22 Mullin's statement that the rates charged for his time and for the
23 attorneys working under his direction has been deemed reasonable by
24 this and other courts. In support, he cites a single decision from
25 this Court. Summit Properties v. New Tech. Elec. Contractors,
26 Inc., No. CV-03-748-HA, Order (D. Or. Aug. 30, 2005).

27 This Court starts its analysis of a reasonable hourly fee by
28

1 looking to the Oregon State Bar Economic Survey⁶. In 2002, the
2 average hourly rate for a Portland attorney with twenty-one to
3 thirty years of experience was \$227, while the median hourly rate
4 was \$225. Rates ranged from \$180 per hour in the twenty-fifth
5 percentile to \$320 in the ninety-fifth percentile.

6 Adjusted for inflation⁷, the average hourly rate in 2006 for
7 a Portland attorney with twenty-one to thirty years of experience
8 is approximately \$255, the median is \$253, with the twenty-fifth
9 percentile at approximately \$202 per hour, and the ninety-fifth
10 percentile at approximately \$360 per hour.

11 The other relevant rates to examine are those for business
12 litigators. In 2002, the average hourly rate for a Portland
13 corporate litigator was \$222 with the median at \$220. The twenty-
14 fifth percentile rate in this category was \$185 while the ninety-
15 fifth percentile was \$333.

16 Adjusted for inflation, the average hourly rate in 2006 for a
17 Portland business litigator is approximately \$249, the median is
18 \$247, with the twenty-fifth percentile at approximately \$208 per
19 hour, and the ninety-fifth percentile at approximately \$373 per
20 hour.

21 Mullin's requested \$400 hourly rate exceeds even the ninety-
22

23 ⁶ Available at:
24 www.osbar.org/surveys_research_econsurv02/econsurvey02.html.

25 ⁷ As seen in the Bureau of Labor Statistics website, the
26 Consumer Price Index (Urban) for All Items shows an average
27 inflation rate of 1.9% for 2003, 3.3% for 2004, and 3.4 percent
28 for 2005. Available at:
<ftp://ftp.bls.gov/pub/special.requests.cpi.cpiiai.txt>. For the
purposes of this Findings & Recommendation, I assume that the
inflation rate for 2006 will be 3.4%.

1 fifth percentile rate for either the "years of experience" category
2 or the "area of practice" category. While defendant's citation to
3 Summit Properties shows that one judge in this Court awarded Mullin
4 \$385 per hour for work performed in 2005, several other judges in
5 this Court have awarded much lower fees for attorneys with more
6 than twenty years of practice. E.g., Fredrickson v. Consolidated
7 Supply Corp., No. CV-05-1704-BR, 2006 WL 752587, at *4 (D. Or. Mar.
8 21, 2006) (\$253 per hour for attorney practicing twenty-one years
9 for research and drafting tasks); Lampert v. Clackamas County, No.
10 CV-03-828-HA, Order at p. 2 (D. Or. Mar. 8, 2006) (\$250 per hour
11 for Portland attorney practicing thirty-one years); Duffy v. Oregon
12 Youth Auth., No. CV-03-6013-HO, Order at p. 6 (D. Or. Feb. 3, 2006)
13 (\$225 per hour for work performed in 2005 by Portland attorney
14 practicing twenty-one years).

15 Given that Mullin's twenty-five years of experience places him
16 in the middle of the category for Portland attorneys with twenty-
17 one to thirty years of experience, it is unreasonable to make an
18 award at the high end of the range. Additionally, while the motion
19 to compel occurred in the context of a corporate litigation case,
20 it was not complex and did not require an extensive discussion of
21 the relevance of unique or complicated documents. I conclude that
22 a reasonable hourly rate for Mullin's time in connection with this
23 motion is \$260 per hour.

24 As for Edling, I conclude that a reasonable hourly rate for a
25 first year associate in the Portland metropolitan area is \$161,
26 which is the average rate for a Portland attorney with one to three
27 years of experience, adjusted for inflation.

28 Based on these rates, I recommend that defendant be awarded

1 \$80.5 for Edling's time and \$1,118 for Mullin's time, for a total
2 award of \$1,198.50.

3 CONCLUSION

4 I recommend that defendant's motion for sanctions (#69) be
5 denied regarding its request to dismiss the case, and granted in
6 part and denied in part as to its request for fees incurred in
7 prosecuting an earlier motion to compel.

8 SCHEDULING ORDER

9 The above Findings and Recommendation will be referred to a
10 United States District Judge for review. Objections, if any, are
11 due September 27, 2006. If no objections are filed, review of the
12 Findings and Recommendation will go under advisement on that date.

13 If objections are filed, a response to the objections is due
14 October 11, 2006, and the review of the Findings and Recommendation
15 will go under advisement on that date.

16 IT IS SO ORDERED.

17 Dated this _____ day of _____, 2006.

18
19
20
21 _____
Dennis James Hubel
United States Magistrate Judge
22
23
24
25
26
27
28